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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

vs.

JOHN LISI, etc., *et al.*,

Respondents.

BRIEF FOR THE AMERICAN TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE*

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American Trial Lawyers Association),
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The American Trial Lawyers Association respectfully submits this brief *amicus curiae* in support of the respondents pursuant to Rule 42 of this Court's revised rules in that on January 11, 1968, Theodore E. Wolcott, Esq., attorney for the respondents gave his written consent to the filing of this brief, and on January 5, 1968, George M. Tompkins, Esq., of the firm of Condon & Forsyth, Esqs., attorneys for petitioner Alitalia consented in writing to the filing of said brief.

Interest of *Amicus Curiae*

The applicant has an interest in this case in that it is a national bar association with over 25,000 members who are trial lawyers primarily engaged in the practice of tort law. The Aviation Law Section of the Association consists of a substantial number of trial attorneys who specialize

in aviation accident law. These practitioners represent injured airline passengers and the estates of deceased passengers in actions currently pending in both state and federal courts throughout the country. Many of these pending cases involve the Warsaw Convention (49 *Stat.* 3000-3026) and, therefore, are concerned with the same question currently before this Court, to wit, may an airline avail itself of the limitation on damages contained in Article 22 of the Convention by delivering a ticket to the passenger which contains a confusing and meaningless reference in Lilliputian-sized print to the Warsaw Convention?

Summary of Argument

The policy underlying the Convention requires that the passengers be given notice of the fact that their right to receive compensation for death or injury is being radically curtailed.

Certain foreign governments and their airlines are attempting to delude the Court by claiming dire consequences will follow an affirmance.

POINT I

Affirmance of the opinion below will be in furtherance of the Convention's policy of providing notice to passengers that their rights are being limited, thus affording them the opportunity of taking self-protective measures. The disasterous consequences which foreign airlines predict will follow in the wake of an affirmance are non-existent.

Despite the plethora of self-serving declarations on the part of the airline industry to the effect that the Warsaw Convention gives great benefits to passengers, it is recognized that the Treaty's "true inspiration and *raison*

d'être'' is the limitation of liability. Cabranes, *Limitations of Liability in International Air Law: The Warsaw and Rome Conventions Reconsidered,* 15 Int'l. & Comp. L. Q. 660, 671 (1966); see also: Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497, 499 (1967).

The benefits allegedly afforded passengers by the Convention are: (a) the creation of a cause of action; (b) a presumption of liability against the airline; (c) jurisdiction in the United States over foreign airlines; and (d) protection against low limits applicable at the place of the accident. However, an examination of American cases shows these alleged benefits to be illusory.

With respect to the creation of a right of action, it has been held that the Convention does *not* create a cause of action. *Noel* v. *Linea Aeropostal Venezolana,* 247 F. 2d 677 (2d Cir.), *cert. denied,* 355 U. S. 907 (1957).

As to the presumption of liability or shift in the burden of proof, since the doctrine of *res ipsa loquitur* is now generally applied to an unexplained airplane accident (W. Prosser, Torts 220-21, 3 Ed. 1964) this ''benefit'' conferred upon the passenger by the Convention is theoretical at best.

Similarly, with regard to jurisdiction over foreign carriers, the advent of state long-arm statutes with their broad ''doing business'' tests, means that the possibility of foreign carriers avoiding jurisdiction in American courts, in the absence of the Convention, is not a real one. ''The only accomplishment of Article 28 was to *preclude* jurisdiction over foreign carriers in a certain number of cases where an action could have been brought if Warsaw had not been applicable.'' (Emphasis added.) Lowenfeld & Mendelsohn, *supra,* 80 Harv. L. Rev. at 526.

Finally, as to the protection against limits lower than that contained in the Warsaw Convention, in view of cases

such as *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961), *Babcock* v. *Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 279 (1963), and *Griffith* v. *United Air Lines, Inc.*, 416 Pa. 1, 203 A. 2d 796 (1964), in which the old doctrine of *lex loci delictus* has been abandoned, the fear that without the Convention American courts would apply low limits of liability to claims of American citizens on accidents occurring abroad has been largely dispelled.

Thus, the only viable benefit granted to anyone by the Convention is that afforded to the carrier, *viz.*, the limitation of damages for personal injury or death to the sum of $8,300. The Second Circuit in its opinion below correctly interpreted the Convention, and the policy underlying it, when it held that as a *quid pro quo* for this "one-sided advantage" there had to be notice to the passenger that "on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash is limited very substantially." 370 F. 2d at 513. This must have been the policy behind Article 3, else why its language to the effect that non-delivery of a ticket will render the limitation inapplicable, but at the same time not affect the applicability of the rest of the Convention?

Foreign international carriers argue that without the protection given them by the Convention's limitation, the economic impact upon them would be "catastrophic." The specter of airlines having to fold their wings, as it were, because of victims of air crashes receiving full compensation for their injuries is absurd when viewed in the light of the practical realities of the industry and its insurance practices.

In the more than 35 years that have elapsed since the drafting of the Convention, international aviation has grown from an infant—arguably worthy of special protection—to a giant fully capable of safeguarding its investment. Forty million international passengers are carried

every year.[1] Commercial aviation can no longer be considered an "ultra-hazardous" activity.

The experience of domestic American carriers, who operate under a system of "unlimited" (i.e., actual provable) damages is noteworthy. Not only are they thriving under this system, but the cost of a domestic passenger ticket per mile is actually *less* than the cost of an international ticket covering the same distance.[2] Since the price of the international ticket is presumably based in part upon the limited liability of the carrier, it is obvious that risk exposure has little effect on either the price of air transportation or its profitability.

The claim on the part of the international carriers that in the absence of the Convention's limitation of liability they would have to pay much higher insurance premiums and sharply raise the price of tickets, is untrue. The cost of the additional insurance premium per passenger on a flight of 3,000 miles from London to New York, has been computed to be 96 cents. Lowenfeld & Mendelsohn, *supra*, at page 556. Furthermore, the cost of such additional premiums will still leave the percentage of the carrier's total operating cost alloeable to insurance far below that allocable to advertising. *Ibid.*, n. 189.

That the foreign governments which control many of the international carriers, are not above resorting to thinly veiled threats of some sort of reprisal is evidenced by the following quotation:

> "If the decision of the majority of the Court of Appeals is to be confirmed the Government of the United

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[1] Canadian Yearbook of International Law 1966, at p. 206.

[2] For example, the distance from New York to Salt Lake City is approximately the same as that from New York to Caracas, Venezuela. The cost of an economy one-way ticket on the purely domestic Salt Lake flight is $119, whereas the cost of the Warsaw flight to Caracas is $175.

> Kindom is concerned that it shall have to take appropriate action to protect its carriers from the unlimited liability ensuing therefrom." Page 8, Brief for the United Kingdom as *Amicus Curiae* in support of the petition for a Writ of *Certiorari*.

What is the United Kingdom threatening to do? Certainly not the cessation of flights to the United States. No one is forcing British carriers to fly to America; they come to this lucrative market because they find it profitable to do so.

The shock expressed by the United Kingdom at the opinion below is curious indeed in view of the fact that "English authorities hold that a carrier failing to deliver a sufficient ticket remains *prima facie* liable; it is not entitled to the benefits of the Convention but is subject to its liabilities." *Warsaw Convention-Limited Liability-Avoidance*, 33 J. Air L. & Com. 478, 479 (1967):

> "Westminster Bank, Ltd. v. Imperial Airways, Ltd. (1936), 2 All E. R. 890 . . . involved a failure to deliver an air consignment note that listed all the particulars required by the Convention, rather than an inadequate delivery of a passenger ticket, but the statements that outline limited liability and avoidance of liability apply equally to a failure to comply with the ticket requirements and the air consignment note requirements. In giving judgment for the plaintiff the court held that under the Warsaw Convention the carrier is prima facie liable for injuries that occur during the course of transport, that the carrier can avoid this liability through Article 20, *but* that it is absolutely and unlimitedly liable if it fails to deliver an adequate air consignment note. *See also* Philippson v. Imperial Airways, Ltd. (1939), 63 Lloyd's List L. R. 119." *Ibid.*

Alitalia claims that the results of an affirmance would be "devasting." What is so devastating about an airline having to print a larger ticket with a readable notice of the limitation of damages?

It has been the Warsaw Convention, with its archaic limitation on damages for death, which has proved "devastating" to the rights of American citizens. It has stripped them of their right to receive adequate compensation for their injuries, and, up until the opinion below, without the necessity of an effective notice to this effect.

When Alitalia failed to deliver a ticket to the passengers containing adequate notice of the limitation on damages, it made it impossible for them to take self-protective measures. "The passengers were thereby deprived of a right which was intended to be afforded them as a concomitant to the carrier's right to limit its liability." *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494, 498 (9th Cir. 1965).

The fact is that the ticket at bar leaves the passenger in the dark as to a serious risk which he cannot appreciate.

The decision below correctly construed a treaty which derogates the private rights of passengers, and in so doing both the District Court and the Court of Appeals have at one and the same time rectified a long-standing injustice and fulfilled the intent of the drafters with respect to giving reasonable notice of the Convention's limitation of liability. To reverse their holdings would be a retrogressive step in treaty construction and would result in irreparable harm to respondents and countless other air travellers similarly situated.

CONCLUSION

The opinion below should be affirmed.

Respectfully submitted,

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American Trial Lawyers Association),
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Certificate.

This is to certify that on the 7th day of February, 1968, copies of the above brief as *amicus curiae* were served by mail pursuant to Rule 33 (1) upon Austin P. Magner, Esq., One Rockefeller Plaza, New York, New York, attorney for petitioner Alitalia-Linee Aeree Italiane, S.p.A., and Theodore E. Wolcott, Esq., 36 West 44th Street, New York, New York, attorney for respondents John Lisi, *et al.*

WALTER H. BECKHAM, JR.